IN THE SUPREME COURT OF THE STATE OF MICHIGAN
(ON APPEAL FROM THE COURT OF APPEALS)

MARGARET PHILLIPS, Personal Representative of The Estate of REGEANA DIANE HERVEY, Deceased, Plaintiff-Appellant, v. MIRAC, INC., a Michigan Corporation, Jointly and Severally, Defendant-Appellee, and DA-FEL-REED Defendant.	S.C. No. 121831 C.A. No. 227257 L.C. No. 98-23923-NI-5

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AMICUS CURIAE BRIEF OF
AMERICAN TORT REFORM ASSOCIATION
IN SUPPORT OF DEFENDANT-APPELLEE

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QUESTION PRESENTED

Whether Michigan's automobile rental vicarious liability statute, M.C.L. § 257.401(3); M.S.A. § 9.2101(3), is constitutional.

STATEMENT OF INTEREST

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

This case is of interest to ATRA because Michigan's automobile rental vicarious liability statute precludes the unfair imposition of liability against automobile renters solely because they own a vehicle, which may be involved in an accident through no fault of their own. This case is also important to ATRA because if this Court were to strike down the statute at issue, its decision would create an unsound precedent contrary to the respect this Court has shown in the past toward legislative action governing liability law.

For these reasons, ATRA urges the Court to affirm the decision of the Court of Appeals below and declare M.C.L. § 257.401(3); M.S.A. § 9.2101(3), to be constitutional.

STATEMENT OF THE CASE

ATRA adopts Defendant-Appellee's summary of the dispute in question.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Increasingly, one of the most frequently raised questions in the public dialogue about civil justice reform is whether courts or legislatures should make tort law. Tort law affects people's lives every day. It can discourage misconduct and help remove truly defective products from the marketplace. On the other hand, unchecked and unbalanced liability can discourage innovation, slow economic growth, result in loss of jobs, and unduly raise costs for consumers. It is, thus, very appropriate to ask, who should decide tort law - courts or legislatures?

The vast majority of tort law has been, and should continue to be, decided by state courts. But, state legislatures also have an important role to play in the development of tort law. As a matter of sound public policy, neither branch of government should have a tort law "monopoly." If that were true – if only this Court's voice could be heard to the exclusion of the Legislative branch – the public would lose out in the long run. The balanced development of tort law would suffer, and so would the public's perception of the judiciary.

This brief will demonstrate that the prerogative of the Legislature to set tort law rules is deeply rooted in Michigan law. The brief will then discuss the balance of power between the Legislature and the courts in developing Michigan law. The brief concludes that, as a matter of both law and sound public policy, this Court should declare M.C.L. § 257.401(3); M.S.A. § 9.2101(3), to be constitutional.

ARGUMENT

I. MICHIGAN COURTS HAVE RESPECTED THE GENERAL ASSEMBLY'S ROLE IN DEVELOPING LIABILITY LAW

For almost a century, both this Court and the Michigan Courts of Appeals have repeatedly recognized and respected the Legislature's broad prerogative to establish liability policy rules for Michigan. Examples that are particularly relevant to this appeal are discussed below.

A. Workers' Compensation

The Legislature's authority to determine liability issues has been supported by this Court since the turn of the last century. In *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N.W. 49 (1915), this Court upheld the constitutionality of Michigan's Workmen's Compensation Law, even though the Court appreciated that the law dramatically altered preexisting

Michigan tort law and treated industrial workers differently than domestic, farm, and casual employees. The Court stated:

> It is to be recognized at the outset that workmen's compensation legislation . . . works fundamental changes in the familiar principles underlying and governing the doctrine of liability for negligence as heretofore applied to the relation of master and servant. *But it by no means follows that this comparatively recent and radical legislation upon the subject, enacted to meet changed industrial conditions, and afford relief from evils and defects which had developed under the old rules of law in negligence cases for personal injuries to employees, violates the spirit or letter of our Constitution.*

187 Mich. At 13, 153 N.W. at 51 (emphasis added). *See also Lahti v. Fosterling*, 357 Mich. 578, 595, 99 N.W.2d 490, 499 (1959) (stating that "no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law....").

B. Automobile No-Fault Insurance

The authority of the Legislature to decide Michigan liability law rules was revisited by this Court in *Shavers v. Attorney General*, 402 Mich. 554, 267 N.W.2d 72 (1978), *cert. denied sub nom. Allstate Ins. Co. v. Kelley*, 442 U.S. 934 (1979). The *Shavers* Court held that the Michigan's No-Fault Insurance Act's partial abolition of tort remedies and $1

million limit on property protection insurance benefits paid under one policy for all damage to tangible property resulting from a motor vehicle accident did "not exceed the Legislature's police power," and was "consistent with constitutional principles articulated by this Court." 402 Mich. at 579, 267 N.W.2d at 77.[1] *See also Struble v. Detroit Auto. Inter-Ins. Exch.*, 86 Mich. App. 245, 256, 272 N.W.2d 617, 623 (1979) (upholding the nature of damages allowed under the No-Fault Act and stating that "It must be remembered that even though a legislative solution appears undesirable, unfair, unjust or inhumane, this in and of itself does not empower a court to override the Legislature and substitute its own solution."); *Moore v. Austin*, 73 Mich. App. 299, 251 N.W.2d 564 (1977) (upholding No-Fault Act).

C. Real Property Statute of Repose

In *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980), this Court further cemented its commitment to upholding

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[1] The Court overturned a different portion of the No-Fault statute which compelled insurance for all motor vehicles. The Court held that the compulsory insurance requirement violated due process because motorists could be refused no-fault insurance or have their insurance cancelled without effective legal redress for challenging refusal or discriminatory cancellation. *See* 402 Mich. At 605, 267 N.W.2d at 89. The Court permitted this section of the Act to remain in effect for 18 months to give the Legislature and the Commissioner of Insurance time to remedy the due process deficiencies.

tort law rules reasonably related to legislative policy objectives. *O'Brien* involved four individual challenges to Michigan's real property statute of repose, M.C.L. § 600.5839(1); M.S.A. § 27A.5839(1). That law bars causes of action against licensed architects or professional engineers for personal injuries stemming from defective and unsafe conditions in an improvement to real property if the harm occurs more than six years after the improvement was completed, used, or accepted.

The *O'Brien* Court summarily rejected plaintiffs' due process and equal protection arguments, stating: "The power of the Legislature to determine the conditions under which a right may accrue and the period within which a right may be asserted is undoubted." 410 Mich. at 14, 299 N.W.2d at 340 (emphasis added). The Court explained that it has long recognized the Legislature's power to extinguish rights of action. In turn, the Court concluded, the Legislature "surely. . . may provide that a particular cause of action can no longer arise unless it accrues within a specified period of time." 410 Mich. at 15, 299 N.W.2d at 341. The Court found that the Legislature acted within its police power when struck a reasonable balance between eliminating the tort liability of architects and professional

engineers and leaving these professionals subject to open-ended and unrestricted liability.

D. Medical Malpractice Expert Testimony

In *McDougall v. Schanz*, 461 Mich. 15, 597 N.W.2d 148 (1999), this Court reviewed the authority of the Legislature to establish strict requirements for the admission of expert testimony in medical malpractice actions brought against specialists. *See* M.C.L. § 600.2169; M.S.A. § 27A.2169. The issue presented to the Court was whether the statute infringed on the judiciary's constitutional authority to promulgate rules governing practice and procedure.

The Court concluded that the statute at issue was an enactment of substantive (rather than procedural) law, and therefore did not impermissible infringe on the Court's rulemaking power. In its opinion, the Court shed light on why it has maintained a longstanding tradition of deferring to the Legislature with respect to "wide-ranging and substantive policy considerations." 461 Mich. at 35, 597 N.W.2d at 158. The Court explained:

> [The statute] reflects a careful legislative balancing of policy considerations about the importance of the medical profession to the people of Michigan, the economic viability of medical specialists, the social costs of "defensive medicine," the availability and affordability of medical care and health

> insurance, the allocation of risks, the costs of malpractice insurance, and manifold other factors, including, no doubt, political factors - *all matters well beyond the competence of the judiciary to reealuate as justiciable issues*.

Id. (emphasis added). These same types of broad policy considerations apply here and support the constitutionality of M.C.L. § 257.401(3); M.S.A. § 9.2101(3).

E. Pharmaceutical Liability Protection

Most recently, this Court upheld M.C.L. § 600.2946(5), which limits the liability of pharmaceutical manufacturers and sellers for harms caused by drugs approved by the U.S. Food and Drug Administration (FDA) and labeled in compliance with FDA approval at the time the drug left the manufacturer's control. *See Taylor v. Smithkline Beecham Corp.*, 468 Mich. 1, 658 N.W.2d 127 (2003).

The issue before the *Taylor* Court was whether using a standard set by the FDA to determine the liability of pharmaceutical manufacturers and sellers constituted an impermissible delegation of power from the Legislature to the FDA. The Court upheld the law, and made clear that the Legislature has the authority to alter duty of care standards in tort cases. 468 Mich. at 14, 658 N.W.2d at 134.

The case at bar does not involve delegation questions, but the underlying issue is relevant here - whether the Legislature may determine when tort liability may lie. As in *Taylor*, the statute in the instant case "represents a legislative determination as a matter of law of when a [party] has acted sufficiently reasonably, solely for the purpose of defining the limits of a cognizable [tort] claim under Michigan law." 468 Mich. at 19, 658 N.W.2d at 137.

F. Liability of Ski Area Operators

In *Grieb v. Alpine Ski Area, Inc.*, 155 Mich. App. 484, 400 N.W.2d 653 (1987), the Court of Appeals upheld a statute (M.C.L. § 408.340 *et seq.*; M.S.A. § 18.483(20) *et seq.*) which protects ski resorts from liability for injuries to skiers. The Court stated that "reducing litigation and stabilizing the economic conditions" of the skiing industry was a legitimate legislative function. 155 Mich. App. at 487, 400 N.W.2d 655. Then, noting that Michigan courts review due process and equal protection challenges to "socio-economic legislation" under a deferential standard, the Court concluded that the "uncertain and potentially enormous ski area operators' liability" was a rational reason for limiting ski area operators' liability. 155 Mich. App. at 488, 400 N.W.2d at 655.

G. Collateral Source Offset

In *Heinz v. Chicago Road Inv. Co.*, 216 Mich. App. 289, 549 N.W.2d 47 (1996), *appeal denied,* 455 Mich. 865, 567 N.W.2d 250 (1997), the Court of Appeals upheld M.C.L. § 600.6303; M.S.A. § 27A.6303, which abolished the common law collateral source rule and provided for tort awards to be offset by the amount of any collateral source payments received by the plaintiff. The court rejected plaintiffs' contention that the law constituted a taking of private property without just compensation, violated due process and equal protection, and infringed on the right to trial by jury. The court said that it was "reasonable to presume" that the Legislature's intent was "to promote fairness" - a proper objective achieved by the legislation. 216 Mich. App. at 301, 549 N.W.2d at 53.

H. Caps on Noneconomic Damages Awards

Most recently, the Court of Appeals has issued several opinions deciding the constitutionality of statutory caps on noneconomic damages awards in Michigan. The majority in *Zdrojewski v. Murphy, M.D.*, 254 Mich. App. 50, 657 N.W.2d 721 (2003), and the concurrence of Judge Kelly in *Wiley v. Henry Ford Cottage Hosp.*, 2003 WL 21568688 (Mich. App. July 10, 2003), found that the Legislature acted within its power when it enacted M.C.L. § 600.1483, which imposes limits on the amount of

noneconomic damages recoverable by medical malpractice plaintiffs. In *Kenkel v. Stanley Works*, 256 Mich. App. 548, 665 N.W.2d 490 (2003), the Court of Appeals upheld M.C.L. § 600.2946a, which similarly limits the recovery of noneconomic damages in product liability cases.

I. Allocation of Fault to Nonparties

Finally, a federal court applying Michigan law has sustained the constitutionality of Michigan tort policy legislation relying on the holdings discussed above. In *Wall v. Cherrydale Farms, Inc.*, 9 F. Supp. 2d 784 (E.D. Mich. 1998), the court held that a Michigan "tort reform" statute which permits the allocation of fault to nonparties (M.C.L. § 600.2957) did not violate due process or equal protection under the Michigan or U.S. Constitutions.

II. THE LEGISLATURE AND COURTS HAVE DIFFERENT STRENGTHS

The Court's long-standing recognition of the separation of powers derives logical and factual support from the inherent strengths of the legislative process. This is particularly true with respect to tort law, because the impact goes far beyond who should win a particular case. The Legislature can focus more broadly on how tort law impacts the availability and cost of goods and services. It has the unique ability to weigh and

balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed decisions about the need for broad public policy changes in the law. Through the hearing process, the Legislature has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully.

As we have explained:

> The legislature has the ability to hear from everybody – plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. * * * [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001). Furthermore, legislative

development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the U.S. Constitution to give the judiciary jurisdiction to decide "cases and controversies." This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

III. THE MICHIGAN SUPREME COURT SHOULD RESPECT THE ROLE OF THE LEGISLATURE IN THE DEVELOPMENT OF TORT LAW AND SHOULD NOT REPLICATE THE DISCREDITED *LOCHNER* VIEW OF CONSTITUTIONAL LAW

A. The Statute at Issue Should Be Declared Constitutional

Vicarious liability for rental car owners is a legitimate legislative concern that has been debated even before the United States House of Representatives. In studying this issue, the Committee on Commerce noted that unlimited vicarious liability -- which would result if this court were to strike down the statute in question -- poses "a significant competitive barrier

to entry for smaller companies attempting to compete in these markets who cannot afford insurance coverage for potentially unlimited liability. This results in less competition and less access for consumers" and the "costs are passed through to consumers in all States." H.R. Rep. No. 106-774, pt. 1 at 5 (2000).

The Michigan Legislature no doubt appreciated these issues when it enacted M.C.L. § 257.401(3); M.S.A. § 9.2101(3). The Legislature also may have sought to remedy the unfairness of unlimited vicarious liability. *See Heinz,* 216 Mich. App. at 301, 549 N.W.2d at 53. And, it may have sought to promote the health of the automobile industry, which sells autos to rental firms. That is a subject of legitimate legislative interest, particularly in Michigan. Other bases that may have guided the Michigan Legislature's decision to adopt M.C.L. § 257.401(3); M.S.A. § 9.2101(3) are discussed at length in the Defendant-Appellee's brief, and therefore do not need to be repeated here.[2]

Furthermore, the Legislature's action put Michigan in the "mainstream" of American law relating to the liability of

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[2] Contrary to the argument of Plaintiff-Appellant, the Legislative is not limited to acting to address liability issues only when there is a "crisis" or the viability of rental companies is threatened. All of the reasons stated in the text above are sufficient and legitimate justifications to support the constitutionality of the law at issue.

automobile rental firms. Prior to enactment of M.C.L. § 257.401(3); M.S.A. § 9.2101(3), Michigan was among only a handful of states that allow for some form of liability for rental car companies.[3] The reason vicarious liability for rental companies remains in so few states is that it is an antiquated holdover from the Nineteenth Century when, before automobiles, a town's livery stable "was deemed to know the disposition of a horse it was lending." H.R. Rep., *supra*, at 4. By way of contrast, "the vast majority of States have agreed that motor vehicles do not generally have dispositions which are likely to cause accidents." *Id.* As Justice Benjamin Cardozo, one of the leading tort law jurists, recognized: "The whole doctrine [of vicarious liability] is foolish, antiquated, unjust, and ought to be abolished. But I suppose we will leave that change to the clumsy process of legislation." *Id.* at 5.

The Michigan Legislature has chosen a reasonable liability scheme that is tied to legitimate policy objectives. The Legislature's decision should be respected.

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[3] Connecticut, Washington, D.C., Iowa, Maine, New York and Rhode Island have unlimited liability; Nevada, Arizona and Nebraska have restricted liability for only those cases in which the rental company does not maintain the required insurance coverage; and Michigan, California and Idaho have capped the liability of companies at the level of financial responsibility laws. *See* H.R. Rep., *supra*, at 5.

B. The *Best* Case Is Bad Model

Plaintiff-Appellant's constitutional attack on of M.C.L. § 257.401(3); M.S.A. § 9.2101(3) is not an isolated filing, but is part of a nationwide effort to have courts nullify rationally based legislative efforts to develop state tort law. The effort has been successful in some, but not most, states. *See* Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

For example, the constitutionality of a statute capping vicarious liability damages for rental car companies has been considered in Florida and was found not to violate that state's constitution. *See Budget Rent-a-car Sys., Inc. v. Bennett*, 847 So. 2d 579 (Fla. App. 2003); *Enter. Leasing Co. S. Cent., Inc. v. Hughes*, 833 So. 2d 832 (Fla. App. 2002), *review denied*, 848 So. 2d 1154 (Fla. 2003).

Furthermore, the majority of courts have upheld statutes that limit vicarious liability or impose caps on damages that may be recovered in tort actions:

- *Evans v. State*, 56 P.3d 1046 (Alaska 2002) (comprehensive tort reform statute including caps on noneconomic and punitive damages, and partial immunity for hospitals from vicarious liability for some physicians' actions did not violate the Alaska or U.S. Constitutions).

- *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.) ($250,000 limit on noneconomic damages in medical malpractice actions did not violate California or U.S. Constitutions), *appeal dismissed*, 474 U.S. 892 (1985).

- *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) ($1 million aggregate limit on damages recoverable in health care liability actions did not violate due process or equal protection provisions of Colorado Constitution).

- *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) ($250,000 cap on noneconomic damages in medical malpractice claims when party submits to a binding medical arbitration panel did not violate Florida or U.S. Constitutions), *cert. denied*, 510 U.S. 915 (1993).

- *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993) (statute providing for only one award of punitive damages award against a products liability defendant for any single act or omission did not violate Georgia or U.S. Constitutions).

- *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115 (Idaho 2000) ($400,000 cap on noneconomic damages in personal injury and wrongful death actions did not violate Idaho Constitution).

- *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980) ($500,000 aggregate limit on medical malpractice awards did not violate Indiana or U.S. Constitutions).

- *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991) (statute eliminating vicarious liability for employers of health care providers did not violate Kansas Constitution).

- *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989) ($100,000 limit on noneconomic damages for wrongful death did not violate Kansas or U.S. Constitutions).

- *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990) ($250,000 limit on noneconomic losses in health care liability actions did not violate Kansas or U.S. Constitutions).

- *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1989) ($500,000 limit on medical malpractice awards against private health care providers did not violate Louisiana or U.S. Constitutions), *cert. denied*, 508 U.S. 909 (1993).

- *Ruiz v. Oniate*, 806 So. 2d 81 (La. App. 2001) ($500,000 limit on medical malpractice awards against public health care providers did not violate Louisiana or U.S. Constitutions); *Batson v. S. La. Med. Center*, 727 So. 2d 613 (La. App. 1998) (same), *rev'd on other grounds*, 750 So. 2d 949 (La. 1999).

- *Peters v. Saft*, 597 A.2d 50 (Me. 1991) ($250,000 limit on nonmedical damages recoverable against servers of liquor did not violate Maine or U.S. Constitutions).

- *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) ($350,000 limit on noneconomic damages in personal injury actions did not violate Maryland Constitution); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (same law held not to violate Maryland or U.S. Constitutions).

- *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) ($400,000 limit on damages for embarrassment, emotional distress, and loss of consortium did not violate Minnesota Constitution).

- *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo.) ($350,000 limit on noneconomic damages recoverable from any one defendant in a health care liability action did not violate Missouri or U.S. Constitutions), *cert. denied*, 506 U.S. 991 (1992).

- *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) ($1.25 million limit on total damages in medical liability actions did not violate Nebraska Constitution).

- *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) ($500,000 limit on general damages against health care providers did not violate Texas or U.S. Constitutions).

- *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) ($1 million limit on recoveries in medical malpractice actions did not violate Virginia or U.S. Constitutions); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (predecessor cap did not violate U.S. Constitution)

- *Robinson v. Charleston Area Med. Center, Inc.*, 414 S.E.2d 877 (W.Va. 1991) ($1 million cap on noneconomic damage awards in medical malpractice actions did not violate West Virginia Constitution); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001) (reaffirming *Robinson* decision).

- *Guzman v. St. Francis Hosp., Inc.*, 623 N.W.2d 776 (Wis. App. 2000) ($350,000 cap on noneconomic damage awards in medical malpractice cases did not violate Wisconsin Constitution), *review denied*, 629 N.W.2d 783 (Wis. 2001).

- *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989) ($250,000 cap on noneconomic damage awards in medical malpractice cases enacted by Virgin Islands legislature did not right to jury trial under U.S. Constitution).

Some state courts that have recently overturned state legislative policy judgments about tort law have done so under the false assumption that state courts have the preeminent right to make state tort law.[4] These decisions do not represent sound public policy. More importantly, the cases show judges

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[4] *See* Comment, *State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*, State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000) (concluding that decision by Ohio Supreme Court to strike down comprehensive tort reform law not only drove "a deeper wedge between the Ohio judiciary and its legislature, but in its efforts to preserve its common law power to formulate tort law, the [court] may have undermined the Ohio Supreme Court's valued position as a defender of the constitution.").

substituting their own views for that of the legislature as to what tort law should be; they do not represent sound opinions. They also raise potential problems under the U.S. Constitution. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001).[5]

One example is a case cited by Plaintiff-Appellant from the Illinois Supreme Court, *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997). That case was a consolidated action involving a product liability case against a forklift manufacturer and a general negligence claim against a railroad. In *Best*, the court overturned a comprehensive Illinois tort reform statute in its entirety, holding that the law violated the Illinois Constitution.

The court held that provisions of the legislation limiting non-economic damages and providing for access to tort claimants' medical records were unconstitutional. The court also declared

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[5] *See also* Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 Seton Hall L. Rev. 649, 664 (2001) ("If too many state courts insist on preserving an historical, illegitimate law-making power to frustrate civil justice reform, perhaps it is not too far-fetched to imagine a federal court solution to the problem.").

unconstitutional a provision of the law that abolished joint liability. This was the first time that *any* court has ever overturned a modification of joint liability.[6] In addition, the court held that these narrow reforms were so inextricably linked to other totally unrelated product liability reforms in the legislation that not one section in the multi-section statute could be severed and saved. Consequently, the court struck down the entire statute as unconstitutional. The decision completely ignored the fundamental principle that a court should only decide the actual case or controversy before it.

The Illinois Supreme Court's overreaching opinion in *Best* also ignored the fundamental separation of powers principle. As Justice Miller wrote in his dissent:

> [T]he judicial role in assessing the constitutionality of legislation is quite limited, and the majority's result here cannot be defended under traditional standards of review. *Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its*

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[6] *See Evans v. Kutch*, 56 P.2d 1046 (Alaska 2002) (statute abolishing joint liability declared constitutional); *Church v. Rawson Drug & Sundry Co.*, 842 P.2d 1355 (Ariz. App. 1992) (statute abolishing joint liability in tort actions held constitutional); *Evangelatos v. Super. Ct.*, 753 P.2d 585 (Cal. 1988) (Fair Responsibility Act which abolished joint liability for noneconomic damages held constitutional); *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990) (statutory limit on municipal joint liability not unconstitutional).

> *essence, the majority's mode of analysis simply constitutes an attempt to overrule, by judicial fiat, the considered judgment of the legislature.*

689 N.E.2d at 1113 (Miller, J., dissenting) (emphasis added).

C. Striking Down Michigan's Automobile Rental Vicarious Liability Law Would Create a Dangerous Precedent That Could Open the Floodgates For Future Litigation

A decision by this Court to strike down Michigan's automobile rental vicarious liability law would create a precedent that courts in the future could utilize to nullify a wide array of state legislation, including laws enacted by the Legislature that restrict, create, or expand liability. Doing so would open a Pandora's box allowing plaintiff's lawyers to challenge a multitude of established Michigan statutes governing liability, including legislation that almost everyone would agree is socially beneficial - statutes protecting those who in good faith report child abuse (M.C.L. § 722.625) or animal abuse (M.C.L. § 333.18827), those who donate food to the needy (M.C.L. § 691.1572), volunteers who assist in cleaning up hazardous material spills (M.C.L. § 324.20302(1)), those who assist fire marshals during an emergency (M.C.L. § 29.7c(1)), and people who in good faith report unsafe hospital practices and conditions (M.C.L. § 333.20180).

Other laws that could be placed in jeopardy might include: M.C.L. § 29.401 (protecting fire fighter instructors from liability resulting from training activities); M.C.L. § 333.20965 (liability protection to first responders who provide emergency medical services); M.C.L. § 330.1427b (liability protection for police officers who comply with the law while putting people into protective custody); M.C.L. § 28.434 (protecting the director of the department of state police from firearm disposal liability); M.C.L. § 380.1312 (providing liability protection for school employees); M.C.L. § 286.473 (protecting farmers from nuisance liability); M.C.L. § 691.1663 (protecting sponsors of horse events from liability); M.C.L. § 380.1313 (protecting school officials who confiscate weapons from students from liability); M.C.L. § 691.1522 (liability protection for restaurant employees who aid choking victims); M.C.L. § 691.1542 (owners of shooting ranges protected from nuisance liability); M.C.L. § 691.1407 (extending governmental immunity to government employees); M.C.L. § 324.73301 (protecting landowners from negligence liability); M.C.L. § 257.625a(6)(e) (liability protection for medical personnel who turn over to prosecutors, as required by law, results of blood tests of drivers in motor accidents); M.C.L. § 380.503 (liability protection for authorizing bodies of public school

academies); and M.C.L. § 333.10203 (liability protection for medical examiners who remove corneas of deceased persons).

Potential challenges also might be brought with respect to statutes that provide for double or treble damages, because these laws modify jury awards and provide for a legislative determination of appropriate damages. *See, e.g.*, M.C.L. § 230.7 (treble damages for harm to bridges); M.C.L. § 429.103 (double damages for breach of contract to buy Michigan wheat); M.C.L. § 600.2919 (double damages for waste by a holder of a present estate; treble damages for carrying away timber, crops, and natural resources from a landowner).

D. The Mistake of *Lochner* Should Not Be Repeated

Nullifying legislative policy decisions about tort law are reminiscent of a highly discredited period in the United States Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "*Lochner* era" (after the unsound decision, *Lochner v. New York*, 198 U.S. 45 (1905)), the Court nullified Acts of Congress that it disagreed with as a matter of public policy, using the

United States Constitution as a cloak to cover its highly personalized decisions.[7]

Just as plaintiffs during the *Lochner* era implored the United States Supreme Court to utilize an expansive view of the United States Constitution to override the Congress and impose their own economic policy views upon the nation, Plaintiff-Appellant in this action seek to convince this Court to utilize an expansive view of the Michigan Constitution to impose Plaintiff-Appellant's economic policy views upon the citizens of Michigan at the expense of the Legislature's rational judgment with respect to tort liability reform. This Court should reject Plaintiff-Appellant's invitation.[8]

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[7] In *Lochner*, the Supreme Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued that, unless legislation violates a fundamental right, the Court should respect legislation that is rationally related to a legitimate goal. Justice Holmes wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because *I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.*

198 U.S. at 75 (Holmes, J., dissenting) (emphasis added).

[8] *See* M. Margaret Branham Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and The Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter

(Footnote continued on next page)

The need for this Court to respect Michigan's long-standing separation of powers principle is particularly reinforced in this case in light of the importance that this Court has attached to the doctrine of *stare decisis*. This Court has said:

> It is well established that overruling precedent must be undertaken with caution. The application of *stare decisis* is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

People v. Petit, 466 Mich. 624, 633, 648 N.W.2d 193, 198 (Mich. 2002) (internal citation omitted). "Alterations are not usually made in a doctrine which is serving well, and with which the bench, bar and public are satisfied." *Kirby v. Larson*, 400 Mich. 585, 618, 256 N.W.2d 400, 416 (1977).

This principle reinforces the need for this Court to uphold the statute at issue.

CONCLUSION

For these reasons, *amicus curiae*, the American Tort Reform Association urges this Court to affirm the decision by the Court

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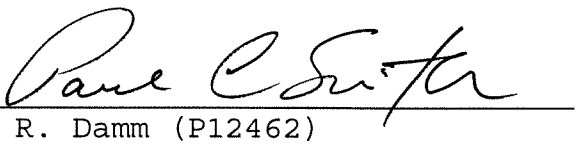
is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

of Appeals below and declare M.C.L. § 257.401(3); M.S.A. § 9.2101(3), to be constitutional.

Respectfully submitted,



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